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IN THE

Supreme Court of the United States

MARK TREESH, in his official capacity as Commissioner of the Kentucky Department of Revenue, and FRANKFORT INDEPENDENT SCHOOL DISTRICT, FRANKFORT, KENTUCKY,

Petitioners,

v.

DIRECTV, INC., and ECHOSTAR SATELLITE, L.L.C.,

Respondents.

On Petition for a Writ of Certiorari to the Kentucky Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

To protect national satellite TV providers from being mired in an array of local taxes that would hinder their ability to compete in a market dominated by cable TV operators, Congress ordered that satellite TV providers "shall be exempt" from taxes imposed by "any local taxing jurisdiction." The question presented is whether the Kentucky Supreme Court correctly held in a unanimous decision that Congress's express mandate preempts taxes on satellite TV imposed by over 150 local school districts in Kentucky—which are situated just like thousands of other local taxing authorities nationwide.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

All parties are identified in the case caption.

Respondent DIRECTV, Inc. has the following parent corporations: DIRECTV Enterprises, LLC, DIRECTV Holdings LLC, The DIRECTV Group, Inc., and DIRECTV. There is no publicly held company that owns 10% or more of DIRECTV, Inc.'s stock. Respondent EchoStar Satellite L.L.C., now known as DISH Network L.L.C. ("DISH"), has the following parent corporations: DISH DBS Corporation, DISH Orbital Corporation, and DISH Network Corporation. There is no publicly held company that owns 10% or more of DISH's stock.

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INTRODUCTION

This case has all the hallmarks of a cert. denial.

First, the case does not present a split in authority among any of the state or the federal courts. In fact, in the 13 years that have passed since Congress enacted § 602, not a single court outside of Kentucky has been called upon to interpret the statute.

Second, this case does not present the Court with an issue of profound national importance. The Department argues that it is necessary for this Court to intervene because there is confusion regarding "[h]ow [the States] may tax DBS providers" in light of the Kentucky Supreme Court's interpretation of § 602. Pet. 32-33. This assertion, however, is belied by the plain language of the statute. Section 602 says clearly what taxes are preempted and what taxes are permitted. It is also at odds with the empirical evidence. Twenty-nine states have levied a tax on satellite TV sales or revenues since § 602 was enacted in 1996. Kentucky aside, none have enacted a tax that comes even close to running afoul of federal law. Given that Kentucky has the same opportunity as those states to enact a state-level non-preempted tax on satellite TV, there is nothing about this case that requires this Court to grant review.

Third, the Kentucky Supreme Court's decision followed this Court's express preemption doctrine by giving effect to unambiguous statutory language reflecting clear Congressional intent. The canon of construction the Department invokes—that courts

must "proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly expressed," Pet. 11 (quoting *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008)), does not apply here because Congress expressly stated its intention in the plainest terms possible to preempt local taxation of satellite TV providers.

STATEMENT[1]

Congress Preempts Local Taxes On Satellite TV.

With the Telecommunications Act of 1996, Congress set out to "promote competition and reduce regulation" in the telecommunications industry, and to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104–104, 110 Stat. 56, 56 (1996). One of its specific objectives was to create a more uniform regulatory environment for satellite TV, sometimes called direct broadcast satellite or DBS. Part of that undertaking was the enactment of § 602, the statute at issue in this case. Section 602(a) is a preemption clause that addresses local taxation of satellite TV:

> (a) Preemption.—A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing

[1] The petition is cited as "Pet." and the Appendix to the petition is cited as "App."

> jurisdiction on direct-to-home satellite service.

Pub. L. No. 104–104, § 602(a), 110 Stat. 56, 144 (codified at 47 U.S.C. § 152 note).

Congress broadly defined "local taxing jurisdiction" to include a number of examples as well as "any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee." § 602(b)(3). Likewise, § 602(b)(5) broadly defines "tax or fee" to include examples such as a "utility tax" and a "gross receipts tax," along with "any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction."

Finally, Congress emphasized that its prohibition is directed toward local bodies, and that States retain the authority to impose their own taxes, and distribute the revenue to local governments: "This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State." § 602(c).

Notwithstanding Congress's Express Prohibition, Kentucky Authorizes Local Taxes On Satellite TV.

Kentucky law authorizes local school districts to impose various taxes on activities conducted within their respective boundaries. The statute provides that "[a]ny board of education of a school district

may . . . levy school taxes authorized" by Chapter 160. KY. REV. STAT. ANN. § 160.593 (2009). One of those taxes is a "utility gross receipts license tax for schools not to exceed three percent (3%) of the gross receipts derived from the furnishing, within the district, of utilities services." *Id.* § 160.613.

Historically, the utility tax did not cover satellite TV. But in 2005, Kentucky revised the statute and gave local school districts the option of extending the tax to "direct satellite broadcast" providers. *Id.* § 160.614. "Direct satellite broadcast" is defined to include "direct broadcast satellite service . . . with programming or voice transmitted or broadcast by satellite . . . directly to the purchaser's premises." *Id.* § 160.6131(7). That definition parallels Congress's definition of "direct-to-home satellite services" in the Telecommunications Act, *see* § 602(b)(1), making Respondents both "direct-to-home" providers for federal purposes and "direct satellite broadcast" providers for Kentucky purposes.

Kentucky did not impose a statewide utility tax on satellite TV service. Rather, the state legislature authorized each local school district to decide for itself whether to impose a utility tax at all. KY. REV. STAT. ANN. § 160.593 ("Any board of education of a school district *may* . . . levy school taxes" including the utility tax.") (emphasis added). Further, the state law contains an "opt out" provision directed specifically at satellite and cable TV. *Id.* § 160.614(4), (5). The provision gave a school district that was already imposing utility taxes the discretion to decide whether to "opt out"

of extending the taxes specifically to satellite and cable TV. *Id.*

Those school districts that elect to impose the utility tax and extend it to satellite TV have another decision to make: They must set the rate of the tax. Each district can determine its own tax rate up to 3% of gross receipts. *Id.* § 160.613(1). The Department of Revenue's website punctuates the point, explaining that "[t]he service provider collects the tax *based on the rate established by the local authority*." Utility Gross Receipts License Tax (School),http://revenue.ky.gov/business/utilschool.html (emphasis added). Only then does the State get involved. In stark contrast to the policy judgments committed to the local districts, the State's role is limited to the ministerial task of collecting the tax that each district has chosen to impose. *See* KY. REV. STAT. ANN. § 160.6154.

At last count, 158 districts have chosen to impose the utility tax on satellite TV service, while 18 have chosen not to. App. 33.

The Circuit Court Holds That Federal Law Preempts The Utility Tax Imposed by Local School Districts.

Respondents are the nation's two largest providers of satellite TV services. They serve 31 million households nationwide, including 500,000 in Kentucky.

Respondents sued the Commissioner of the Department of Revenue and the Frankfort Independent School District (collectively, the "Department") in Franklin Circuit Court.

Respondents argued that the utility tax is preempted by § 602(a) insofar as it applies to satellite TV services. They sought declaratory relief and an injunction against collection of the tax.

The Circuit Court granted Respondents' motion for summary judgment and enjoined enforcement of the utility tax against satellite TV providers. The court described its conclusion that § 602 preempts the school district tax on satellite TV providers as "elementary" in light of Congress's clear words: The local school districts "both 'impose' the [utility tax] and qualify as a 'local taxing jurisdiction,'" and § 602(a) "expressly states [that] a local taxing jurisdiction may not impose a tax on DBS service providers." App. 38.

Over A Vigorous Dissent, The Court Of Appeals Reverses The Circuit Court.

A divided Court of Appeals reversed the Circuit Court's decision. The majority concluded that the express preemption provision in § 602(a) did not apply because Kentucky law regards education as a state rather than a local function and thus hold that the tax was imposed for a state purpose. App. 23. It did not explain why the purpose of the tax under state law was germane to the explicit federal definition of "local taxing jurisdiction" in § 602(a). The court also noted that the State collects the taxes on the school districts' behalf and then sends the revenue back to the districts. *Id.* It did not, however, explain how the language of § 602(c), which explicitly requires the State to both "collect[] and impose[]" a tax on satellite TV to avoid

preemption, could be read to allow local school districts to impose utility taxes.

The dissenting judge explained that "the issue is not the nature of the tax but is whether a school district is a local taxing jurisdiction which imposes the tax." App. 28. On that issue, he concluded that "[c]ommon sense dictates that a school district be considered a local taxing jurisdiction." *Id.*

The Kentucky Supreme Court Reverses And Holds, Unanimously, That The Utility Tax Is Preempted.

The Kentucky Supreme Court unanimously reversed the Court of Appeals, and held that the utility tax was preempted by § 602. To reach its conclusion, the court applied clearly defined principles of express preemption that this Court has often repeated.

The court observed that § 602(a) expressly preempted "any tax or fee imposed by any local taxing jurisdiction," and that Kentucky's local school districts met the definition of a "local taxing jurisdiction." App. 6. Thus, because it was "undisputed that the gross receipts license taxes at issue are imposed by approximately 140 of Kentucky's 170 local school districts," the Kentucky Supreme Court concluded that federal law preempted the utility tax. App. 6-7.

While not necessary given the clarity of § 602(a), the court emphasized the point by examining the legislative history of the provision. It correctly concluded that Congress's intent with § 602 was to "spare national businesses with little impact on

local resources from the administrative costs and burdens of local taxation in the myriad local jurisdictions where their services would be sold" and that "[c]ompliance with an enormous hodgepodge of local taxes would impose administrative costs, which, in Congress's view, were undue since satellite providers . . . do not depend on local rights-of-way or a community's 'physical facilities or services.'" App. 10.

When the court compared the disputed tax to the legislative history of § 602, it arrived at the only possible conclusion: That "Kentucky's gross receipts license tax entails precisely the locality-by-locality administrative burdens Congress intended to preempt," App. 11, and is therefore barred by § 602(a) of the Telecommunications Act of 1996.

The Department now petitions this Court to review the unanimous decision of the Kentucky Supreme Court for error.

REASONS TO DENY THE WRIT

The petition should be denied because: (I) It presents no split of authority; (II) this case presents no issue of national importance that warrants this Court's intervention; and (III) the Kentucky Supreme Court's analysis was both correct and consistent with this Court's established jurisprudence.

I. THERE IS NO SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The Department concedes that the Kentucky Supreme Court's decision is not in conflict with the

decision of any other state or federal court. Pet. 33. What it neglects to mention, however, is that other than this case, no court has ever been asked to interpret § 602.

At a minimum, this means the question presented is not ripe for this Court's review. It is also empirical evidence that there is nothing confusing about the scope of § 602 that requires this Court to intervene. Indeed, the fact that all seven justices of the Kentucky Supreme Court agreed that § 602 preempted the utility tax speaks volumes about this case. A cynic might expect an elected judiciary in one of the poorest states in the nation to stretch to find any way to draw more tax revenues into its faltering school system. Their unanimity confirms there was no way to construe either § 602 or the utility tax to save the latter from preemption.

II. THE UNANIMOUS DECISION BELOW DOES NOT GIVE RISE TO A QUESTION OF PROFOUND NATIONAL IMPORTANCE.

Nor does this case present an issue of national importance that requires this Court to intervene. The Department argues that cert. should be granted because of some question regarding "[h]ow [the States] may tax DBS providers" in light of the court's interpretation of § 602 below. Pet. 32. Despite the absence of any evidence that such confusion actually exists, the Department asserts that "[i]t is important for this Court to intervene now to clarify the scope of the exemption allowed

by § 602 because . . . States need the money now!" Pet. 33.

While States may need money, there is nothing profound or important about the Kentucky Supreme Court's interpretation of § 602. For starters, the answer to "how the States may tax DBS providers" is found in the plain language of § 602. As discussed above, § 602(a) exempts satellite TV providers only from collecting or paying taxes imposed by local governments. It says nothing about taxes imposed on satellite TV at the state level. But to avoid any confusion, Congress went one step further, and made clear in § 602(c) that:

> This section [§ 602] shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

Pub. L. No. 104-104, § 602(c), 110 Stat. 56, 145 (codified at 47 U.S.C. § 152 note).

Thus, § 602 provides States with a virtual instruction manual on how to tax satellite TV providers consistent with federal law. It answers questions like:

- Can a state legislature impose a tax on satellite TV and direct the proceeds to a town or transportation district? Yes.
- Can a municipality levy a sales tax on a satellite TV provider? No.

It also helps explain why there is no confusion in the States regarding the scope of § 602. Twenty-nine states have enacted legislation that imposes some form of state tax on satellite TV sales or revenues. In accordance with § 602(c), a number of these states direct a portion of the revenue generated from those taxes to municipalities. Kentucky aside, none of them has enacted a tax that comes even close to violating § 602. Kentucky has the same opportunity as other states to secure funding for its schools without running afoul of federal law. Given this opportunity, the importance of this case does not come even close to the level of importance necessary for this Court to grant review.

At bottom, the Department is right. This petition is all about money—and specifically, Kentucky's need for "money now!" The Department wants this Court to reverse the decision below not because of any legal question about the scope of preemption under § 602, or confusion regarding how it can tax satellite TV without violating federal law. Rather, the Department wants a reversal so that it can collect the roughly $70 million in taxes, interest, and penalties that Respondents would have owed if the Kentucky Supreme Court had simply affirmed the Court of Appeals. Just as this Court does not sit as a court of errors, it does not sit to solve Kentucky's budget woes.

III. THE KENTUCKY SUPREME COURT'S DECISION WAS A TEXTBOOK APPLICATION OF RECENT SUPREME COURT DECISIONS.

A. The Court Below Applied Established Precedent Faithfully To Conclude That The Utility Tax Was Preempted.

In concluding that Kentucky's local school districts violate § 602(a) when they levy utility taxes on satellite TV providers, the Kentucky Supreme Court faithfully and correctly applied the principles this Court has laid out in its decisions on express preemption.

The Kentucky Supreme Court began by correctly reciting the controlling legal principles. The court observed that "[w]here, as in this case, Congress has expressly declared its intention to preempt an area of state law, a reviewing court's task is reduced to determining the scope of the intended preemption." App. 5. Quoting from this Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996), the court below acknowledged that the "ultimate touchstone" of this Court's preemption analysis was to understand the "congressional purpose" of § 602, which "primarily is discerned from the language of the preemption statute and the statutory framework surrounding it." App. 6 (quoting *Lohr*, 518 U.S. at 485-86). Consistent with this Court's preemption analysis, the Kentucky Supreme Court also recognized that legislative history is "an important indicator of Congress's intent." *Id.* (citing *Shaw v. Delta*, 463

U.S. 85 (1983)). Significantly, the Department does not dispute that the Kentucky court stated the law correctly. Rather, it argues that the court below reached the wrong result in applying the well settled law to the facts of this case. But the Department is wrong.

The court below first looked at the plain language of § 602(a) and held that the utility tax fell squarely within its ambit. The Kentucky Supreme Court did not reach this conclusion based on some "expansive interpretation" of § 602. Instead, it simply recognized that "local taxing jurisdiction" is defined in § 602 to include "any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State." The court concluded that this broad definition easily encompassed school districts:

> It is undisputed that the gross receipts license taxes at issue are imposed by approximately 140 of Kentucky's 170 local school districts; that each district may set the applicable tax rate, with the rates varying from district to district; and that a given district may exempt cable and satellite programming providers from the tax altogether if it so decides.

App. 6-7. Based on those facts, the court held that the plain language of § 602 expressly preempted the utility tax. App. 7-8.

Finally, the court looked to the legislative history of § 602 to buttress its conclusion. App. 8.

It noted that "Congress's intent with Section 602 was not to spare [satellite TV] providers from taxation as such, but to spare national businesses with little impact on local resources from the administrative costs and burdens of local taxation in the myriad local jurisdictions where their services would be sold." App. 10. The court observed that even if those burdens are less significant in light of recent technology—a key argument raised by the Department both here and below—it does not matter, "for Congress has determined that the burden may not be imposed at all." App. 11. Put another way, the Kentucky Supreme Court correctly refused to unilaterally amend § 602 to reach the outcome the Department (and local school districts) desired.

B. The Kentucky Supreme Court's Analysis Was Consistent With This Court's Precedent Regarding Clear Direction from Congress on Preemption.

The Department argues that the Kentucky Supreme Court erred by failing "to recognize and consider" the canon of statutory construction "that courts should proceed carefully when asked to recognize an exemption from taxation that Congress has clearly expressed." Pet. 11. Relying on this Court's decisions in *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2337–38 (2008), and *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 52 (1989), it asserts that the Kentucky Supreme Court violated this canon by failing to "consider a more narrow

interpretation" of § 602 that would allow local school districts to levy a tax on satellite TV providers that was mandated by the state legislature.

The Department is mistaken. The canon of statutory construction upon which it relies applies only in situations where the language of the preemption statute is ambiguous or has been applied in a way that defies its plain meaning. The statute at issue in *Piccadilly*, for instance, provided a tax exemption for any asset transferred "under a plan *confirmed* under [Chapter 11] of the Bankruptcy Code." 128 S. Ct. at 2329 (emphasis added). Piccadilly, however, was granted a tax exemption for assets transferred before its Chapter 11 plan was confirmed by the Bankruptcy Court. *Id.* at 2329–30. This Court looked first to the statute's plain language and concluded that the "more natural reading" would not exempt asset transfers from state taxation until after the bankruptcy plan had been confirmed. *Id.* at 2333. The Court also observed that even if the statute was ambiguous, federalism canons would compel it to construe the statute's exemption narrowly, thus leading to the same result. *Id.* at 2338; *see also Sierra Summit*, 490 U.S. at 851 (relying on same federalism canon to hold that state tax was not preempted by federal law where neither plain language nor legislative history called for broad exemption of state taxes).

But the federalism canon discussed in *Piccadilly* has no bearing on this case. Section 602 is plainly an express preemption clause—it even bears the

label "Preemption." The statute also unambiguously delineates the scope of Congress's preemptive aim: Satellite TV providers "shall be exempt from . . . any tax . . . imposed by any local taxing jurisdiction" on satellite TV providers. § 602(a). This was not a situation, like *Piccadilly*, where the lower court interpreted the statute in a way that violated its plain language. The Kentucky Supreme Court simply applied the natural meaning of the statute's plain language to a tax that was admittedly imposed by local school districts rather than the state legislature.

At the end of the day, the Department's complaint is not that the court below interpreted § 602(a) incorrectly, but rather that it refused to interpret the statute in a way that would contradict the express intent of Congress.

C. The Kentucky Supreme Court Correctly Held That Local School Districts Impose the Utility Tax In Violation of § 602(a).

Each of the Department's other critiques is similarly flawed.

The Department contends, for instance, that the court erred by rejecting the argument that it was the state legislature, and not the local school districts, that "imposed" the tax. This assertion, however, ignores the plain language of the state statute. Each school district is responsible for deciding whether to levy the utility tax at all, and whether to extend it to satellite TV in particular. KY. REV. STAT. ANN. §§ 160.593, 160.614(4), (5).

As the Circuit Court observed, "the decision whether or not to impose the School Tax is made by the local school board; not the State." App. 37. What is more, the local school districts also determine their own tax rates, within the 3% limit. KY. REV. STAT. ANN. § 160.613(1).

The Department also claims that the utility tax falls outside of § 602 because Kentucky state law regards it as imposed for a state purpose. But even if this was true, it would not save the tax from § 602(a). The question under § 602(a) and (c) is not whether a tax "levied and collected by municipal or county or district officers" is for a state or local purpose. The question under federal law is simply whether the tax is (1) "imposed by any local taxing jurisdiction," or rather (2) "imposed and collected by a State." If a tax falls into the former category, it is preempted, regardless of its purpose.

Moreover the Department's argument runs head-on into the rule that "[i]n the absence of a plain indication to the contrary,'" federal statutes are not to be interpreted as turning on state law. *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 603 (1971) (quotation omitted); *see also Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003) ("State law . . . cannot be our reference point. Rather, to give proper meaning to a federal statute we must be guided by the plain meaning of the statute, canons of statutory construction, relevant legislative history, and other indicia . . . ."). Given Congress's unmistakable interest in promoting uniformity with § 602, there is no basis for interpreting § 602 to incorporate anything like the

majority's "state purpose" test. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) ("Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile.").

Finally, it should be noted that Kentucky's school districts are no different from thousands of other local jurisdictions throughout the United States. True, the State authorized the tax in the first place. But contrary to the Department's assertion, that does not mean that the State "imposed" the tax. If any tax that a state has authorized is a "state tax" and thus outside the scope of preemption, then § 602 would be a nullity. Local governments are creatures of the state, and any taxation powers they exercise derive from the state. *See, e.g., City of Louisville v. Sebree*, 308 Ky. 420, 425, 214 S.W.2d 248, 251 (1948) ("[A] municipality's power to tax is only that which the legislature has granted it.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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